Annual Review of Developments on Instructions—2000[1]

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Introduction

This article is one in a series of annual reviews of military instructional issues and primarily covers cases decided in fiscal year 2000.[2] The target audience is the military trial practitioner, though anyone with an interest in jury instructions may find the article beneficial. Trial and defense counsel are reminded, however, the primary resource for drafting instructions remains the *Military Judges' Benchbook*.[3]

Substantive Criminal Law Instructions

Vicarious Liability: United States v. Browning

There are a variety of ways under the military justice system in which an individual can be held criminally liable for the actions of others. The concept is known as vicarious liability (VL), and it is expressly described in the Uniform Code of Military Justice: "Any person punishable under this chapter who—commits an offense punishable by this chapter, or aids, abets, counsels, commands or procures its commission . . . is a principal."[4] In other words, "[a] person who aids, abets, counsels, commands, or procures the commission of an offense is equally guilty of the offense as one who commits it directly, and may be punished to the same extent."[5]

Military justice practitioners commonly associate this provision with "accomplice liability," but the Court of Appeals for the Armed Forces (CAAF) has interpreted Article 77 much more broadly. Chief Judge Everett observed in an opinion published in 1986: "Although Article 77 does not specifically deal with the vicarious liability of a coconspirator, we believe that the language of Article 77(1) is broad enough to encompass it."[6] As such, "each conspirator is liable for all offenses committed pursuant to the conspiracy by any of the co-conspirators while the conspiracy continues and the person remains a party to it."[7] The *Benchbook* contains a pattern instruction describing this concept for the members.[8]

This concept occasionally causes some difficulty for practitioners in a variety of ways. The general practice in the military justice system is that all principals are charged as if they were the actual perpetrators of the crime;[9] a specification alleging larceny by a co-conspirator will generally read, "In that you, did, at or near (location) on or about (date) steal property, of some value, the property of the victim." There is not necessarily any explicit indication that the prosecution is alleging that the accused is vicariously liable for the larceny, and the pleadings may not give any notice to defense counsel that vicarious liability is going to be in issue. The most common way in which the defense counsel and the military judge will know of the vicarious liability issue is because the trial counsel has also charged a conspiracy involving the same conduct. Even in the absence of such pleadings, the defense counsel will learn hope-

1. The authors gratefully acknowledge the assistance of Colonel John Galligan and Colonel Kenneth Clevenger, Chief Circuit Judges for the Third and Fifth Judicial Circuits, respectively.

2. *See, e.g.*, Colonel Ferdinand D. Clervi, et al., *Annual Review of Developments in Instructions—1999*, Army Law., Apr. 2000, at 108.

3. U.S. Dep't of Army, Pam. 27-9, Legal Services: Military Judges' Benchbook (1 Apr. 2001) [hereinafter Benchbook].

4. UCMJ art. 77 (2000).

5. Manual for Courts-Martial, United States, pt. IV, ¶ 1.b. (2000) [hereinafter MCM].

6. United States v. Jefferson, 22 M.J. 315, 324 (1986).

7. MCM, *supra* note 5, ¶ 5.c.(5).

8. Benchbook, *supra* note 3, para. 7-1-4.

9. MCM, *supra* note 5, R.C.M. 307(c)(3) Discussion.

fully of the theory during the pretrial investigation or when he receives notice, in response to his request, of the general nature of the other uncharged crimes, wrongs, or acts that the prosecution intends to introduce at trial. Occasionally, though, one or more of the relevant actors is still unsure about the theory of criminal liability prior to trial, and the military judge is called on to order a bill of particulars or similar relief prior to trial.

Vicarious liability can also rear its head during the instructional phase of the trial. In *United States v. Browning*,[10] the accused was charged with larceny of currency from the U.S. government, but was not charged with conspiracy to commit larceny. The trial counsel nevertheless gives the accused notice of his intent to introduce other uncharged crimes, wrongs, and acts in the form of testimony by various individuals that the government believed were the co-conspirators with the accused. The accused moved in limine to exclude the evidence, but was unsuccessful.[11]

The contested evidence establishing the actions of co-conspirators was eventually admitted, and the military judge instructed, in accordance with a prosecution request, on the prosecution's theory of vicarious criminal liability. He told the members that the accused could be found guilty if he aided and abetted another in committing an offense. He also instructed the members that the accused could be found guilty if he was a member of a conspiracy and the actual criminal act was done by another conspirator in furtherance of the conspiracy.[12] At the conclusion of these instructions, defense counsel objected to the conspiracy instruction as misleading.[13]

In response to this objection, the military judge reiterated his instructions on vicarious liability and ensured that the panel understood them. Significantly, the military judge then asked counsel if they had any objections to the instructions; the defense counsel asked in response if a spillover instruction had been given, and when assured by the military judge that one had been given, the defense counsel said, "Then I have no objections."[14] The accused was convicted and on appeal asserted that the military judge erred by admitting evidence of an uncharged conspiracy and giving the vicarious liability instructions.[15]

On appeal, the CAAF held unanimously that "the military judge did not err by permitting the Government to prove some of the offenses on a theory of vicarious liability, even though a conspiracy was not specifically alleged on the charge sheet."[16] The court compared the charge sheet to a federal indictment, and quoted federal precedent for the proposition that the purpose of the indictment was "to state concisely the essential facts constituting the offense, not how the government plans to go about proving them."[17] The court also stated that the defense counsel had waived any objection to the instructions at trial when, notwithstanding his earlier objection, the defense counsel said he had "no objections" in response to the military judge question after he had repeated the VL instructions to the members. Since the court held that there was no error at all, they did not even reach the question of plain error regarding the instructions.[18]

The basic lesson of this case is that it is generally permissible to allow the government to introduce evidence of vicarious liability of the accused and thereafter instruct on vicarious liability, even if the pleadings do not expressly mention vicarious liability. Pattern instructions concerning the various forms of vicarious liability can be found at paragraph 7-1 in the *Benchbook*. They are located in chapter seven with evidentiary instructions rather than those concerning offense definitions.

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10. 54 M.J. 1 (2000).

11. *Id.* at 3-4.

12. *Id.* at 4-5.

13. The objection was articulated as follows:

> I object to the conspiracy instruction being given because I'm afraid that it's misleading the Panel into thinking that, even if for some reason they don't think [the accused] actually committed these offenses, that if he somehow was involved in this, they could find him guilty of conspiracy, and he's not charged with that and I don't believe that that's a lesser included [sic].

Id. at 5.

14. *Id.* at 6.

15. *Id.* at 3.

16. *Id.* at 8.

17. *Id.* at 7.

18. *Id.* at 8.

Another practice pointer for all parties concerns waiver. The pattern trial script in the *Benchbook* prompts the military judge to ask counsel twice if they object to instructions: once at the discussion of findings instructions, and once at the conclusion of the instructions themselves. The military judge should be sure not to omit those questions of counsel, and if the military judge does have to reinstruct the members for any reason, counsel should be asked for objections or requests for additional instruction after the supplementary instruction is completed. A negative response from defense counsel, without more, may waive the initial objection made to the instruction.

The unanswered question that remains after *Browning* is what to do in the case if there is no notice *at all* to defense counsel that the government intends to rely on a theory of vicarious liability and the defense counsel has made no request for a bill of particulars: if the evidence tends to establish vicarious liability, should the military judge instruct on vicarious liability in this circumstance in the absence of notice or take other measures? This issue was not presented in *Browning* and is a closer question. The prudent military judge should inquire of trial counsel as to whether the government intends to seek instruction on vicarious liability as soon as evidence is introduced that tends to support that theory of liability. In an appropriate case, the defense counsel may decide to seek a continuance to prepare a defense to the theory of vicarious liability, or move for a mistrial "when such action is manifestly necessary in the interest of justice."[19]

Accomplice Liability: United States v. Williams

Lieutenant Commander Dudley Williams, U.S. Navy, was charged with, and convicted of, a variety of offenses including soliciting an enlisted person to distribute heroin.[20] In support of this offense, the prosecution offered only the testimony of former Chief Petty Officer Jeffrey Kendall. In his testimony, Kendall described himself as an accomplice of the accused.[21] The accused described him as a "chronic liar" and, as such, challenged the sufficiency of the evidence against him for this charge on appeal.[22] The court of appeals held that Kendall's testimony against the accused was legally sufficient to sustain the conviction, and affirmed.[23]

In the course of evaluating the legal sufficiency of the evidence against the accused, the CAAF made several observations that may be relevant to the form of instructions concerning accomplice liability. Judge Sullivan, writing for a unanimous court, stated that military law no longer requires corroboration to support a conviction, even when the accomplice's testimony is "self-contradictory, uncertain, or improbable."[24] According to Judge Sullivan, the proper standard is found in Rule for Courts-Martial (RCM) 918, which provides: "Findings may be based on direct or circumstantial evidence. Only matters properly before the court-martial on the merits of the case may be considered. A finding of guilty of any offense may be reached only when the factfinder is satisfied that guilt has been proved beyond a reasonable doubt."[25]

The only aspects of the previous rule that may survive in military law are those stated in the discussion accompanying RCM 918 in the MCM: "Findings of guilty may not be based solely on the testimony of a witness other than the accused which is self-contradictory, unless the contradiction is adequately explained by the witness. Even if apparently credible and corroborated, the testimony of an accomplice should be considered with great caution."[26]

In light of the CAAF's unanimous opinion in *Williams*, some portions of the pattern instruction on accomplice liability may be unnecessary to deliver to the members. For example, the pattern instruction now informs the members of the following:

> (Additionally, the accused cannot be convicted on the uncorroborated testimony of a purported accomplice if that testimony is self-contradictory, uncertain, or improbable.)
>
> (In deciding whether the testimony of (state the name of the witness) is self-contradictory, uncertain, or improbable, you must consider it in the light of all the instructions concerning the factors bearing on a witness' credibility.)
>
> (In deciding whether or not the testimony of (state the name of the witness) has been corroborated, you must examine all the evidence

19. MCM, *supra* note 5, R.C.M. 915(a).

20. United States v. Williams, 52 M.J. 218, 218-19 (2000).

21. *Id.*

22. *Id.* at 221.

23. *Id.* at 222.

24. *Id.*

25. *Id.*

26. *Id.*

> in this case and determine if there is independent evidence which tends to support the testimony of this witness. If there is such independent evidence, then the testimony of this witness is corroborated; if not, then there is no corroboration.)
> (You are instructed as a matter of law that the testimony of (state the name of the witness) is uncorroborated.)[27]

These parenthetical comments describing a purported requirement for corroboration of accomplice testimony in the pattern instruction may not be consistent with the current description of the law concerning findings in RCM 918. However, there is some ambiguity in the *Williams* opinion. After unreservedly asserting that there is no longer a corroboration requirement for accomplice testimony under military law, Judge Sullivan hedges his position by saying that "even if this evidentiary insufficiency rule is still good law . . . it was not violated in this case."[28] Judges and counsel that have a case involving testimony by an individual who may be an accomplice of the accused should review the *Williams* opinion for themselves before using an instruction that may no longer be consistent with the case law or RCM 918.[29]

Consent and Intoxication: United States v. Grier

Private First Class (PFC) Paul Grier, U.S. Army, was suspected of raping and sodomizing the wife of a fellow soldier. Special Agent (SA) Wagner of the Army Criminal Investigation Command interviewed PFC Grier and discovered that the alleged victim may have been intoxicated on the night in question.[30] Special Agent Wagner then told PFC Grier that "if a person is intoxicated, they are unable to consent" to intercourse, and that consent is "a verbal affirmation."[31] Special Agent Wagner did not explain to appellant that there are different levels of intoxication, nor did he clarify that "not all of these levels mean a victim is unable to consent to sexual intercourse."[32] Private First Class Grier then told SA Wagner that his case "was quite possibly a rape."[33]

While the statement that PFC Grier gave to SA Wagner apparently was not admitted into evidence at his subsequent trial for rape and sodomy, portions of the exchange described above were admitted as impeachment evidence.[34] The military judge gave the following instruction to the members:

> When a victim is incapable of consenting because she is asleep or unconscious or

27. BENCHBOOK, *supra* note 3, para. 7-10.

28. 52 M.J. at 222.

29. A simpler instruction, based on the current pattern instruction found in the *Benchbook* but without mention of a corroboration requirement, would read something like this:

> You are advised that a witness is an accomplice if he/she was criminally involved in an offense with which the accused is charged. The purpose of this advice is to call to your attention a factor specifically affecting the witness' believability, that is, a motive to falsify his/her testimony in whole or in part, because of self-interest under the circumstances. (For example, an accomplice may be motivated to falsify testimony in whole or in part because of his/her own self-interest in receiving (immunity from prosecution) (leniency in a forthcoming prosecution) (_____).) The testimony of an accomplice, even though it may be apparently credible, is of questionable integrity and should be considered by you with great caution.
>
> Whether (state the name of the witness), who testified as a witness in this case, was an accomplice is a question for you to decide. If (state the name of the witness) assisted, encouraged, advised, or in any other way associated or involved himself/herself with the offense with which the accused is charged with a criminal purpose or design, he/she would be an accomplice whose testimony must be considered with great caution. In deciding the believability of (state the name of the witness), you should consider all the relevant evidence (including but not limited to (here the military judge may specify significant evidentiary factors bearing on the issue and indicate the respective contentions of counsel for both sides)).

The author suggests that revision of the pattern instruction to improve comprehension by the members of the court-martial is also in order. Such a revised instruction might read as follows:

> You have heard the testimony of _____, who (claimed to have) (has been described by [another witness] [other witnesses] as having) been involved in the same offense(s) with which the accused has been charged. You should view with great caution the testimony of any witness who may have been criminally involved in the commission of any offense with which the accused is charged, even if the testimony is apparently credible. Such a witness may have an interest in the outcome of this case that could give (him) (her) a motive to testify falsely. It is for you to determine whether the testimony of _____ has been affected by (self-interest) (an agreement [he] [she] may have with the government) ([his] [her] own interest in the outcome of the case) (prejudice against the accused) (_____). It is your duty to determine the believability of the witnesses, and you may give the testimony of each witness such weight as you think it deserves.

A thorough and generally well-reasoned analysis of this issue may be found in Colonel James A. Young, III, *The Accomplice in American Military Law,* 45 A.F. L. REV. 59 (1998).

30. United States v. Grier, 53 M.J. 30, 32 (2000).

31. *Id.*

> intoxicated to the extent that she lacks the mental capacity to consent, then no greater force is required than that necessary to achieve penetration . . . . If Cherise was incapable of giving consent and if the accused knew or had reasonable cause to know that Cherise was incapable of giving consent because she was asleep or unconscious or intoxicated, the act of sexual intercourse was done by force and without her consent.[35]

This instruction generally follows the text of the pattern instruction at note 11 in para. 3-45-1 of the *Military Judges' Benchbook*, and the defense counsel did not object to the instruction as given. The judge reminded the members that "any references by counsel to the law or to my instructions do not constitute instructions on the law, which may only be given by me in my judicial capacity."[36] The military judge also told the members "that they were bound by his statements of the law; that is, witnesses and counsel cannot tell members what the law is."[37]

The accused was ultimately convicted of rape and other offenses, and the Army Court of Criminal Appeals (ACCA) affirmed the findings. The CAAF granted review on the following issue:

> Whether the military judge erred as a matter of law by failing to properly define the law of 'consent' and 'intoxication' for the members, where the military judge also failed to inform the members that the legal conclusions used by the . . . Criminal Investigation Command agent during appellant's interrogation were erroneous.[38]

In the unanimous opinion of the court affirming the accused's conviction, Chief Judge Crawford noted that the military judge had explained to the members that he was the sole source of law and accurately explained the law concerning consent to the members.[39] As for the meaning of the phrase "or intoxicated" as used by the military judge in his instructions, the CAAF adopted ACCA's conclusion that "in the context of the descriptive terms preceding that phrase and the totality of all the instructions given on this issue, [the phrase] could only be understood to address intoxication to a degree rendering legal consent impossible."[40] Especially in the absence of any objection by defense counsel to the instructions at issue, the CAAF held "that there was no error and no prejudice to appellant's substantial rights."[41]

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32. *Id*. at 32-33.

33. *Id*. at 33.

34. *Id*. Special Agent Wagner and the accused had the following exchange:

> Q. In your honest opinion, do you think Mrs. LEWIS was in a state of mind where she could give consent to having intercourse?
> A. No.
> Q. Why do you think Mrs. LEWIS did not give consent to intercourse?
> A. She was not in her right state of mind.
> Q. What is your definition of rape?
> A. Forcing someone to have sex when they do not want to or have intercourse with someone who is not in their right state of mind.
> Q. What do you mean not in their right state of mind?
> A. Not fully aware of the situation.
> Q. By your definition, what do you call the events on 7 Jun 96?
> A: It is quite possibly a rape case.
> Q. Do you have anything to add to this statement?
> A. At the time this happened, I did not know if a woman is not capable of giving consent, it is rape. Now I know it is rape.

Id.

35. *Id*.

36. *Id*.

37. *Id*.

38. *Id*. at 31.

39. *Id*. at 34.

40. *Id*. (citation omitted).

41. *Id*.

There are two key practice pointers to take away from the opinion in *Grier.* The first concerns the presentation of evidence: The military judge and counsel should always be alert to the possibility that a witness may stray into testimony in the form of impermissible or inaccurate legal conclusions. This misstep is particularly likely to occur when the witness is involved with law enforcement, social work, and other fields that commonly use legal terms in their own professional contexts. Such testimony should be forestalled, if possible. If the testimony is unavoidable (as appeared to be the case in *Grier*), the military judge should consider giving a tailored curative instruction immediately after a witness testifies to a misleading or inaccurate legal conclusion in addition to the routine instructions on findings or sentence.

The second lesson for practitioners is that some modification of the pattern *Benchbook* instruction concerning intoxication and consent in the context of a sexual assault case may be appropriate. For example, note 11 of para. 3-45-1 informs the members concerning consent when the alleged victim of rape is asleep, unconscious, or intoxicated. By adding the phrase in italics below to the concluding paragraph of that (and similar) instruction, the military judge will ensure that the members properly understand the legal significance of intoxication in cases involving sexual assault:

> If (state the name of the alleged victim) was incapable of giving consent, and if the accused knew or had reasonable cause to know that (state the name of the alleged victim) was incapable of giving consent because she was (asleep) (unconscious) (intoxicated *to the extent that she lacks the mental capacity to consent*), the act of sexual intercourse was done by force and without consent.

What Is a Human Being?: United States v. Nelson

Hull Maintenance Technician Third Class Sharon Nelson, U.S. Navy, delivered her baby one evening alone in her room on board the ship to which she was assigned.[42] She sought no medical assistance during the delivery, and waited twelve hours before she presented herself and her dead child at a local civilian hospital.[43] As a result, she was charged with involuntary manslaughter through culpable negligence in violation of Article 119, UCMJ.[44] The evidence in the case raised the issue of whether the child was "born alive."[45] The government theory at trial was "that the child passed through the birth canal alive and that the infant had no congenital birth defects that would have caused death."[46] But testing during autopsy indicated that the child had never taken a single breath.[47]

As the CAAF observed on appeal, "[w]here . . . the evidence raises an issue as to whether a child 'had a separate and independent life prior to death,' it is necessary to define the term 'human being' in the course of providing instructions to the members on the issue of whether a 'human being' was killed."[48] In this regard, the military judge gave the following instruction at trial:

> Both the greater offense of involuntary manslaughter and the lesser offense of negligent homicide require proof beyond a reasonable doubt that the child was born alive in the legal sense, that is, the child had been wholly expelled from its mother's body and possessed or was capable of an existence by means of circulation independent of the mother's. Included in the term "circulation" is the child's breathing or capability of breathing from its own lungs. For the accused to be found guilty of either the greater offense of involuntary manslaughter or the lesser offense of negligent homicide, you must be convinced beyond a reasonable doubt based upon the evidence that the accused's newborn infant was born alive.[49]

The instruction was derived from an opinion of the Air Force Board of Review, *United States v. Gibson*,[50] and neither party objected to the instruction at trial.[51]

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42. United States v. Nelson, 53 M.J. 319, 322 (2000).

43. *Id.* at 325.

44. *Id.* at 321.

45. *Id.* at 322.

46. *Id.* at 321.

47. *Id.* at 322.

48. *Id.* at 321.

49. *Id.* at 322-23.

The accused was found guilty at trial, and the CAAF affirmed.[52] However, the Navy-Marine Corps Court of Criminal Appeals (NMCCA) suggested that the "born alive" standard described by the military judge in his instructions provided inadequate protection, as a matter of public policy, to a newborn infant. The NMCCA extended the definition of "born alive" to those infants fully expelled from the mother, capable of existing independently of the circulatory system of the mother, and which also show "any other evidence of life such as beating of the heart, pulsation of the umbilical cord or definite movement of voluntary muscles."[53] Significantly under the instant facts, the CAAF concluded that "an infant *need not be breathing* at the time it is fully expelled from its mother so long as it 'shows any other evidence of life.'"[54]

The CAAF reviewed the decision of the service court to decide whether it had erred by adopting this so-called "viability" standard for determining if an infant is "born alive" in connection with a prosecution for manslaughter in violation of Article 119, UCMJ.[55] The CAAF rejected the approach of the lower court. While acknowledging that *Gibson* was not binding precedent on either the CAAF or the service court, the court stated that *Gibson* "accurately reflects the modern common law view."[56] The public policy concerns identified in the case were inadequate to persuade the CAAF that a court rather than a legislature should revise the definition of "human being" announced in *Gibson*.[57] The unanimous opinion of the court concluded "that the military judge's instructions were not in error and that it was unnecessary for the Court of Criminal Appeals to modify the *Gibson* standard."[58]

The primary lesson for practitioners to take from *Nelson* derives from an observation made by the service court in this case: "Neither the UCMJ nor the *Manual for Courts-Martial* defines the term 'human being,' or the term 'born alive.'"[59] The author of the service court opinion might have added that the *Benchbook* is likewise bereft of any guidance for crafting a proper instruction defining these terms. Counsel and military judges must be alert to the reality that the *Benchbook* does not and cannot contain pattern instructions for every possible topic that can be encountered in court-martial practice. The time to discover gaps in the coverage of the *Benchbook* is prior to trial, not when the members are waiting.

Instructional Omission: United States v. Davis

On 9 May 1995, the nine-month-old daughter of Hospitalman Darwinn Davis, U.S. Navy, died as a result of edema, caused by a subdural hematoma.[60] Davis was supervising his daughter at the time that she suffered the hematoma, and no one but the accused witnessed the events that caused the hematoma. Davis made three subsequent statements that all attempted to explain the injuries to his child as the result of his efforts to avoid a traffic accident while he and his daughter were riding in his vehicle. In the statements, the accused admitted that he had either failed to secure the car seat to the car itself using the seat belt or that he had failed to properly buckle the child into the car seat.[61]

Davis was charged with unpremeditated murder and making false official statements under the theory that the accused caused the subdural hematoma and consequent edema when he struck and shook his daughter.[62] The defense contention was that the accused caused the injuries to his daughter by swerving the car that he was driving to avoid a traffic accident while the child was not properly secured in her car seat.[63] At trial, the statements of the accused were admitted into evidence, but the

50. 17 C.M.R. 911 (A.F.B.R. 1954). The Air Force Board of Review in *Gibson* cited approvingly this description of the common law position as to when a child was born alive: "For the People were bound to establish . . . that the child was born alive in the legal sense, that is, had been wholly expelled from its mother's body and possessed or was capable of an existence by means of a circulation independent of her own[.]" *Id.* at 926 (citation omitted).

51. *Nelson*, 53 M.J. at 322.

52. *Id.* at 320.

53. *Id.* at 323 (citing United States v. Nelson, 52 M.J. 516, 521 (N-M. Ct. Crim. App. 1999), *aff'd*, 53 M.J. 319 (2000)).

54. *Id.*

55. *Id.* at 320.

56. *Id.* at 323.

57. *Id.*

58. *Id.* at 324.

59. United States v. Nelson, 52 M.J. 516, 520 (N-M. Ct. Crim App. 1999).

60. United States v. Nelson, 53 M.J. 202, 203 (2000).

61. *Id.* at 203-04.

62. *Id.* at 203.

accused did not testify.[64] Defense counsel requested an instruction concerning involuntary manslaughter as a lesser-included offense of the homicide charge, but did not request an instruction concerning negligent homicide as a lesser-included offense nor concerning accident as a special defense.[65] The military judge instructed the members on involuntary manslaughter by committing a battery on the child as a lesser included offense.[66] The military judge did not instruct on either negligent homicide or accident, nor did the defense object to the instructions that were given.[67] The accused was found guilty of involuntary manslaughter, and NMCCA affirmed his conviction.[68] The CAAF granted review to consider whether the trial judge erred by failing to give an instruction *sua sponte* on the special defense of accident or the lesser-included offense of negligent homicide.[69] The court held that the military judge did not err by failing to instruct the members on the special defense of accident, but it reached a different conclusion as to the lesser-included offense of negligent homicide. The failure of the military judge to instruct on negligent homicide was deemed reversible error, and the findings and sentence were set aside.[70]

The court began its analysis of both issues with a review of the applicable standards for when such instructions are required. The opinion of the court, authored by Judge Gierke and joined by three other judges, asserted that: "When evidence is adduced during the trial which 'reasonably raises' an affirmative defense or a lesser-included offense, the judge must instruct the court panel regarding that affirmative defense or lesser-included offense."[71] To reasonably raise the defense of accident in connection with the operation of a car, the court noted that there must be some evidence that the accused was driving "carefully, lawfully, and without neglect."[72] Since the accused had admitted in his various statements that he was negligent in failing to properly secure his daughter in her car seat, the court concluded that the military judge did not err by failing to instruct on the special defense of accident.[73]

The court approached the omitted instruction concerning negligent homicide somewhat differently. The opinion first observed that "[t]he test whether an affirmative defense is reasonably raised is whether the record contains some evidence to which the court members may attach credit if they so desire."[74] According to the CAAF, if the defense is "reasonably raised" by the evidence, "instructions on lesser-included offenses are required unless affirmatively waived by the defense."[75] In the instant case, there was some evidence that the accused killed his daughter by negligently shaking her, as well as some evidence that he killed his daughter by negligently securing her in her car seat.[76] However, as the court noted, "The members were never required to address whether appellant's negligence in any form—not attaching the seatbelt to the car seat, not properly fastening the straps in the car seat, or negligently shaking her—was the cause of the child's injuries and death."[77] As such, the omission by the military judge was deemed prejudicial error that warranted setting aside the findings and sentence.[78]

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63. *Id.*

64. *Id.* at 204.

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.* at 203.

69. *Id.*

70. *Id.* at 205.

71. *Id.*

72. *Id.* (citation omitted).

73. *Id.*

74. *Id.*

75. *Id.* (citation omitted).

76. *Id.* at 204.

77. *Id.* at 206.

78. *Id.*

The *Davis* opinion is full of treasures and landmines for the practitioner. The opinion of the court is a helpful reminder to military judges that they *must* instruct on *all* lesser-included offenses and special defenses at issue in a given case, even in the absence of a request by counsel. The CAAF reiterates the oft-forgotten point that the instructional duty of the military judge is largely independent of the theory of the parties in the case, and the quantum of evidence that triggers the duty is very small.[79] Each military judge should therefore develop a system for ensuring that no included offenses or special defenses are overlooked. The military judge should consult Part IV of the *Manual for Courts-Martial* prior to trial and identify the lesser-included offenses listed there for each charged offense.[80] The military judge should presume that he is going to give instructions concerning those included offenses unless the evidence in the case or other factors persuade him otherwise. There is, unfortunately, no equivalent listing of special defenses in the *Manual*. As such, the military judge should consider using a checklist of special defenses like that found in the *Army Judges' Reference Library* or similar collections to record those defenses raised by the evidence in the case.

The military judge should also consider adding to the trial script a "waiver query" pertaining to instructions. After discussing on the record with counsel the included offenses and defenses upon which the judge intends to instruct, the military judge should then ask the defense counsel if he waives instruction on any included offenses or special defenses not named by the military judge. While such a waiver may not end appellate litigation on the issue of omitted instructions, it may serve to move the locus of the litigation to the effective assistance of counsel rather than the apparent omission by the military judge.

A more troubling aspect of the *Davis* opinion is the terminology used by the court in discussing the instructional obligations of the military judge. The court repeatedly uses the term "reasonably raised" in connection with the amount of evidence required to trigger the instructional duty of the military judge.[81] However, the court defines the term as follows: an affirmative defense is reasonably raised when "the record contains some evidence to which the court members may attach credit if they so desire."[82] It is apparently the existence of "some evidence" that triggers the instructional duty, not its quality; indeed, the military judge must disregard the source of the evidence or its credibility in determining whether the threshold has been crossed. As the court states in *Davis*, "Any doubt whether an instruction should be given should be resolved in favor of the accused."[83] Moreover, RCM 920 (pertaining to instructions) does not use the term "reasonably raised" at all, but instead refers to an included offense or special defense as being "at issue."[84] The latter term is to be preferred to "reasonably raised" in that it is less likely to confuse the military judge or counsel into thinking that a qualitative evaluation of the evidence is required in deciding whether to instruct on an included offense or special defense.

Evidentiary Instructions

Trumpeting the Demise of "Curative Instructions"

Does this sound familiar? In a child rape case, the trial counsel calls an expert to testify about the typical responses of sexual abuse victims and whether the alleged victim exhibits symptoms consistent with one who was sexually abused.[85] Rather than answer the question posed, however, the expert responds: "Based on my evaluation of Mary, I believe her when she says she was sexually abused." The defense counsel imme-

79. *Id.* at 205.

80. Interestingly, negligent homicide is listed in Part IV of the *Manual* as a lesser-included offense of all homicides under Article 118, UCMJ, see MCM, *supra* note 5, pt. IV, ¶ 43.d.(2)(c), and involuntary manslaughter under Article 119, UCMJ. *See also* MCM, *supra* note 5, pt. IV, ¶ 44.d.(2)(b).

81. *E.g.*, *Nelson*, 53 M.J. at 205.

82. *Id.*

83. *Id.* (citation omitted).

84. MCM, *supra* note 5, R.C.M. 920(e)(5). The discussion accompanying RCM 920(e) goes on to assert that "a matter is 'in issue' when some evidence, without regard to its source or credibility, has been admitted upon which the members might rely if they choose." *Id.*

85. *See, e.g.*, United States v. Halford, 50 M.J. 402 (1999) (stating that an expert may offer evidence that the characteristics demonstrated by the victim led to a diagnosis of rape-trauma syndrome which is probative on the issue of consent); United States v. Birdsall, 47 M.J. 404 (1998) (stating that expert testimony that victim's conduct or statements are consistent with sexual abuse or consistent with complaints of sexually abused children normally admissible); United States v. Rynning, 47 M.J. 420 (1998) (questioning whether child's behavior consistent with individuals who have been raped or whether injuries are consistent with a child who has been battered are permissible); United States v. Marrie, 43 M.J. 35 (1995) (testifying that false allegations extremely rare and outside one's clinical experience is improper); United States v. Cacy, 43 M.J. 214 (1995) (testifying that expert explained importance of being truthful and based on child's responses recommended further treatment was an improper affirmation that expert believed the child); United States v. Houser, 36 M.J. 392 (C.M.A. 1993) (stating that expert may testify that certain behavior characteristics are consistent with a "rape trauma model"); United States Suarez, 35 MJ 374 (stating expert testimony regarding post traumatic stress syndrome and child sexual abuse accommodation syndrome and appearance of similar characteristics in sexually abused children and whether those characteristics seen in alleged victim is allowed); United States v. Harrison, 31 M.J. 330 (C.M.A. 1990) (stating that an expert may testify as to what symptoms are found among children who have suffered sexual abuse and whether the child-witness has exhibited these symptoms).

diately objects and moves for a mistrial. The military judge sustains the objection but denies the mistrial motion, concluding that strong instructions would cure the taint. In *United States v. Armstrong*,[86] the CAAF addressed this recurring problem and appears to have devalued the impact of such instructions.

Army Master Sergeant Michael Armstrong, a soldier with over twenty-three years of otherwise honorable service, allegedly committed indecent acts upon his fifteen-year-old stepdaughter, CA, over an eighteen-month period beginning in December 1994.[87] The stepdaughter testified the accused would come into her bedroom in the morning and wake her up by rubbing her shoulders, touching her and lowering himself so his penis was in her open hand.[88] The accused testified in his own defense and admitted accidental contact and exhibiting poor judgment; he denied doing anything for the purpose of arousing, appealing to or gratifying his lust or sexual desires.[89]

In rebuttal, the trial counsel called a psychologist who worked as a "validator" for the county social services department.[90] Her job was to evaluate children and determine if they display symptoms of sexual abuse. Recognizing the potential danger, the defense counsel objected to the testimony calling her "a human lie detector."[91] The trial counsel responded that he would not use the word "validator" and the witness would limit her testimony to symptoms consistent with sexual abuse. The military judge overruled the objection.[92] The psychologist took the stand and was asked if she was able to form an opinion as to whether CA exhibited characteristics and responses consistent with those exhibited by victims of sexual abuse.[93] The expert responded: "My opinion is that the information that I obtained during the course of the evaluation with [CA] is highly indicative of her being sexually abused by her father."[94] The defense counsel did not restate his objection and, on cross-examination, got the expert to admit that there could be other explanations for CA's behavior.[95] Immediately after the expert testified, the military judge instructed the members that they must disregard the expert's testimony to the extent that she implied that she believed CA or that a crime occurred.[96] The judge repeated the instruction before the members closed to deliberate on findings.[97]

On appeal, the government conceded the expert's response was error but argued it was harmless.[98] The CAAF disagreed. Significantly, the court found no other physical or testimonial evidence corroborating CA's allegations and described her in-court performance as "the ambiguous, uncertain testimony of a 17-year-old girl who appeared to live in a fantasy world and may be prone to perceptual inaccuracies."[99] Conversely, the court described the expert as "powerful, throwing the full weight of her impressive curriculum vitae behind her unequivocal and highly prejudicial conclusion that [CA] was sexually abused by her father."[100] While acknowledging that curative instructions have rendered such errors harmless in the past,[101] the court had "'grave doubts' about the military judge's ability

86. 53 M.J. 76 (2000).

87. *Id*. at 77.

88. *Id*.

89. *Id*. at 79.

90. *Id*. at 80.

91. *Id*.

92. *Id*.

93. *Id*. at 81.

94. *Id*.

95. *Id*.

96. The instruction, taken substantially from the *Benchbook*, was as follows:

> You are advised that only you, the members of the court, determine the credibility of the witness and what the facts of this case are. No expert witness can testify that the alleged victim's account of what occurred is true or credible, or that a sexual encounter occurred. To the extent that you believe that [the expert] testified or implied that she believes the alleged victim or that a crime occurred, you may not consider this as evidence that a crime occurred.

Id. at 81; *see also* Benchbook, *supra* note 3, para. 7-9-1.

97. *Armstrong*, 53 M.J. at 81.

98. *Id*.

99. *Id*.

to 'unring the bell'"[102] in this case and reversed the conviction.[103]

The practical value of the case is that it confirms the general rule that trial counsel should assume nothing and must repeatedly emphasize to their expert witnesses during the course of pretrial preparation to answer only the specific questions asked. Expert witnesses should not testify about victim credibility, should not infer that they believe a victim's allegations, and certainly should not testify that a victim was in fact sexually abused by the accused. It may also be a good idea for defense counsel to raise the issue in a pretrial Article 39(a) session and give the military judge the option of discussing the matter directly with the witness. If these prophylactic measures are not taken and the witness discloses similar improper opinions in front of the members, at least in cases where there is no physical or testimonial evidence corroborating the allegations, not only may curative instructions be insufficient to remove the taint, such error may no longer be considered harmless on appellate review.

The [Accused] Doth Protest Too Much, Me Thinks[104]*—"Other Acts" Evidence in Sex Cases*

American jurisprudence is grounded in the notion that we try cases rather than persons.[105] As such, the Military Rules of Evidence (MRE) generally prohibit the introduction of character and bad acts evidence against an accused if offered strictly to prove he is a bad person and is just the kind of service member who would commit the charged offenses.[106] When adopted for court-martial use on 6 January 1996,[107] MREs 413 and 414 represented a significant departure from this general prohibition and trial counsel have since found it easier in sexual assault and child molestation cases to introduce evidence of the accused's sexual history on the issue of the accused's propensity to commit these types of offenses.[108] While a number of service courts of criminal appeals have addressed the constitutionality of these rules,[109] it was not until last year that the CAAF decided the issue. In *United States v. Wright*, [110] the court held that MRE 413 did not violate an accused's due process or equal protection rights because of the military judge's requirement to weigh the probative value of the evidence against the risk of unfair prejudice.[111]

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100. *Id.*

101. *See, e.g.*, United States v. Harris, 51 M.J. 191 (1999) (given accused's express desire to avoid second trial coupled with curative instructions, military judge did not abuse his discretion in failing to sua sponte declare mistrial in case where trial counsel repeatedly elicited improper credibility testimony from expert witness); United States v. Skerrett, 40 M.J. 331 (C.M.A. 1994) (proper limiting instructions, along with presumption that members follow those instructions, eliminated risk of harm from improper expert credibility evidence).

102. *Armstrong*, 53 M.J. at 82 (citing Kotteakos v. United States, 328 U.S. 750, 766 (1946)).

103. *Id.*

104. With the sincerest of apologies to The Lady, see WILLIAM SHAKESPEARE, HAMLET, act 3, sc. 2.

105. Daniel J. Buzzetta, Note, *Balancing the Scales: Limiting the Prejudicial Effect of Evidence Rule 404(b) Through Stipulation*, 21 FORDHAM URB. L.J. 389 (1994).

106. Rule 404(a) provides that evidence of a person's character or trait of character is not admissible for the purpose of proving that the person acted in conformity therewith on a particular occasion. MCM, *supra* note 5, MIL. R. EVID. 404(a). The usual application of Rule 404(b)'s "other acts . . . other purposes," language also precludes prosecutorial use of the accused's uncharged acts to prove character. *Id.* MIL. R. EVID. 404(b) ("evidence of other crimes, wrongs, or acts is not admissible to prove character . . . . It may, however, be admissible for other purposes . . . .").

107. *See* STEPHEN A. SALTZBURG ET AL., MILITARY RULES OF EVIDENCE MANUAL 615 (4th Ed. 1997).

108. "By propensity, I mean evidence offered to show the accused committed certain offenses in the past, thus has a disposition to commit such offenses, and is therefore more likely to have committed a similar offense on the occasion at issue." James S. Liebman, *Proposed Evidence Rules 413-415—Some Problems and Recommendations*, 20 U. DAYTON L. REV. 753, 754 (1995).

109. *See, e.g.*, United States v. Myers, 51 M.J. 570 (N-M. Ct. Crim. App. 1999).

110. 53 M.J. 476 (2000).

111. The CAAF resolved the same questions concerning the scope and applicability of MRE 414 in *United States v. David R. Henley*, 53 M.J. 488 (2000) (emphasis added).

In *Wright*, the court provided several factors the trial court should consider in the MRE 403 balancing test and the case is a good starting point for counsel to understand just what the trial judge considers in ruling on the admissibility of other sexual acts and child molestation evidence.[112] Recognizing the significance of these important developments in MREs 413 and 414, the Army Trial Judiciary recently approved a new "other crimes, wrongs or acts evidence" instruction for inclusion in the *Military Judges' Benchbook*, a copy of which is appended to this article as Appendix A.

Sentencing Instructions

Confinement, Forfeitures AND Fines, Oh My!

A Coast Guard special court-martial composed of a military judge alone convicted Joselito Tualla of unauthorized absence, disobeying lawful orders, wrongful use of anabolic steroids, assault, adultery, malingering, and obtaining $996.60 in telephone services.[113] The convening authority approved a sentence of a bad conduct discharge, confinement for five months, reduction to E2, forfeiture of $326 pay per month for six months and a $996.60 fine.[114] On its own motion, the Coast Guard Court of Criminal Appeals (CGCCA) disapproved the fine,[115] holding that RCM 1003(b)(3)[116] prevents a special court-martial from imposing a sentence that includes both a fine and forfeitures. In United States v. Tualla,[117] the CAAF reversed the lower court, again[118] holding that a special court-martial may impose a sentence that includes both a fine and forfeitures, when the combined fine and forfeitures do not exceed the amount of two-thirds forfeitures authorized for that forum.[119] The court further noted no inherent conflict between RCM 1003(b)(3) and Article 58B, which requires in certain circumstances automatic forfeitures during any period of confinement.[120]

Counsel are reminded, when seeking both a fine and forfeitures in member cases at a special court-martial, to insure that the military judge instructs that the combination cannot exceed the total amount of forfeitures authorized for that forum, calculated at the pay grade of any adjudged reduction.

Retirement Benefits, Revisited

In *United States v. Boyd*,[121] Captain Gregory Boyd, an Intensive Care Unit nurse at Eglin Air Force Base Hospital, Florida, pled guilty to damaging and stealing military property, wrongfully using three different controlled substances, and conduct unbecoming an officer.[122] He had completed fifteen years and six months of active service at the time of trial and his defense counsel requested an instruction concerning the effect of a dismissal on his potential retirement benefits[123] because, as an officer, he did not have to re-enlist in order to reach twenty years of service.[124] The military judge declined. On appeal, the

112. Some of these factors include: the time lapse between the acts; strength of proof of the prior act; probative weight of the acts and the potential for less prejudicial evidence; similarity between the acts; relationship between the parties; the circumstances surrounding each offense, such as the methods of commission, ages of the victims and the locations, manner and scope of abuse; and the frequency of the acts. *Wright*, 53 M.J. at 482. *See also* SALTZBURG ET AL., *supra* note 107, at 618.

113. *See* United States v. Tualla, 50 M.J. 563, 565 (C.G. Ct. Crim. App. 1999).

114. *Id*.

115. *Tualla*, 50 M.J. at 565.

116. R.C.M. 1003(b)(3) provides:

> Any court-martial may adjudge a fine instead of forfeitures. General courts-martial may also adjudge a fine in addition to forfeitures. Special and summary courts-martial may not adjudge any fine in excess of the total amount of forfeitures which may be adjudged in that case.

MCM, *supra* note 5, R.C.M. 1003(b)(3).

117. 52 M.J. 228 (2000).

118. *See* United States v. Harris, 19 M.J. 331 (C.M.A. 1985) (a fine and forfeitures can be combined at a single summary or special court-martial sentence so long as the combined total does not exceed the amount of the maximum forfeitures that could be adjudged at such a court). The CGCCA declined to follow *Harris* holding that, because the case was a two-judge decision with one judge concurring in the result, it was not binding precedent.

119. *Tualla*, 52 M.J. at 232.

120. Unless deferred by the convening authority, any sentence which includes confinement for more than six months (or death), or confinement for a lesser period and a punitive discharge will result in forfeiture of all pay and allowances in a general court-martial and two-thirds pay in a special court-martial, effective not later than fourteen days after the sentence is announced, for the duration of the member's confinement. *See* UCMJ art. 58b. The court recognized that careful consideration by the staff judge advocate in advising the convening authority on action would likely moot many of the issues associated with automatic forfeitures pushing the aggregate total of forfeitures and fines over the statutory maximum. *Tualla*, 52 M.J. at 232.

121. 52 M.J. 758 (A.F. Ct. Crim. App. 2000).

122. *Id*. at 760.

Air Force Court of Criminal Appeals (AFCCA) noted that the loss of retirement benefits for one who is eligible to retire at the time of trial is relevant and it is appropriate for the members to consider the consequences of a punitive discharge on those benefits.[125] The court further noted that one need not immediately be eligible to retire to present evidence or request an instruction but must be knocking at the door or perilously close to retirement to warrant such an instruction.[126] The court held that an officer who is four and a half years away from retirement eligibility is neither "knocking at the door," nor "perilously close" to retirement[127] and found the judge did not abuse his discretion[128] when he refused to instruct as requested.[129]

Counsel should recognize that whether the potential loss of retirement benefits is relevant will depend on the facts and circumstances of a given case and whether an accused has to re-enlist in order to reach twenty years of service is an important factor to consider.[130] However, the most significant factor remains the length of time between trial and potential retirement eligibility.[131]

Your Honor, Does Life Mean Life?: Instructing on Collateral Sentencing Matters

In *United States v. Duncan*,[132] Private First Class Timothy Duncan, United States Marine Corps, engaged in a series of brutal crimes against four individuals over a six-week period. He was eventually found guilty of attempted murder, attempted robbery, attempted forcible sodomy, conspiracy to rape and rape, larceny, kidnapping, communicating a threat, and carrying a concealed weapon.[133] At trial, the officer members interrupted their sentencing deliberations and asked the judge whether therapy would be required if the accused were to be confined and whether parole was available for a life sentence.[134] The defense counsel objected to answering the questions because they concerned collateral consequences and asked that the members be instructed that these questions were "off-limits."[135]

123. Once a punitive discharge is adjudged and ordered executed, it terminates a service member's military status and any concomitant right to receive military retirement benefits. *See* United States v. Sumrall, 45 M.J. 207, 208-09 (1996).

124. *Boyd*, 52 M.J. at 761.

125. *Id*. at 766.

126. United States v. Greaves, 46 M.J. 133, 139 (1997) (stating that it is an error not to instruct on effect of punitive discharge on retirement benefits for accused with nineteen years, ten months of service); United States v. Becker, 46 M.J. 141, 143 (1997) (stating that it is an error to exclude evidence of retirement benefits when accused was three and one-half months from retirement eligibility without need to re-enlist); United States v. Henderson, 29 M.J. 221 (C.M.A. 1989) (stating that an instruction on retirement benefits not required for enlisted member who was three years from retirement eligibility and would have to re-enlist to reach twenty-year point).

127. *Boyd*, 52 M.J. at 766.

128. United States v. Perry, 48 M.J. 197, 199 (1998) (stating that the judge's decision to give or deny instruction on consequences of a particular sentence is reviewed on appeal for an abuse of discretion).

129. *Boyd*, 52 M.J. at 767.

130. *Becker*, 46 M.J. at 141.

131. *Boyd*, 52 M.J. at 766.

132. 53 M.J. 494 (2000).

133. *Id*. at 495.

134. The members asked: "Will rehabilitation/therapy be required if Private First Class Duncan is incarcerated?" and, "In military justice, is parole granted or are sentences reduced for good behavior? If so, do these reductions apply to a life sentence?" *Id*. at 498.

135. *Id*.

The judge, however, answered the questions by first explaining to the members that they were an "independent agency" whose job it was to determine guilt or innocence and impose an appropriate sentence.[136] The judge then told the members that other authorities would review the case, but they should do whatever they felt was right and not rely on what others might do.[137] The judge concluded this portion of his response by telling the members that parole is available for those sentenced to confinement by a military court, including life imprisonment, but that the exercise of parole depends on several factors and that they should not be concerned about the impact of parole in determining what term of confinement they believe is appropriate.[138] Regarding rehabilitation, the judge told the members that although participation in such programs was not mandatory, treatment was available and incentives existed to encourage the confinee to participate.[139] The accused was sentenced to a dishonorable discharge, total forfeitures, confinement for life,[140] a $200 fine, and reduction to E-1.[141] On appeal, the CAAF considered the propriety of the military judge's response to these questions and found no error.[142]

In recent years, the court has rejected bright-line rules prohibiting instructions on collateral sentencing matters[143] and has adopted a flexible approach focusing on a military judge's responsibility to give "appropriate sentencing instructions."[144] Therefore, counsel must be prepared to offer information to the military judge in order to answer court member questions which rationally relate to the sentencing considerations in RCM 1005(e)(5), such as those asked in *Duncan*. In most cases, this will require counsel to identify in advance of trial the types of sentencing issues that potentially may arise during the course of the court-martial and conduct some basic pretrial research in order to assist the judge in responding to member questions.

You Don't Say! Restricting the Accused's Unrestricted Unsworn Statement

In two recent cases, the AFCCA looked at the scope of an accused's unsworn statement. In *United States v. Friedmann*,[145] the court addressed a military judge's instructions regarding the accused's reference to dispositions in other cases. In *United States v. Satterley*,[146] the court looked at the propriety of a military judge's refusal to permit an accused to respond to a member's question by making an additional unsworn statement.

At a special-court martial, Airman Tracy Friedmann pled guilty to absence without leave, dereliction of duty, wrongfully using marijuana, and wrongfully introducing marijuana onto a military installation. During his unsworn statement, the accused told the court members that two of the four airmen who smoked marijuana with him received Article 15s and general discharges. He asked the members not to adjudge a punitive discharge but allow the command to administratively separate him.[147] Without objection, the military judge instructed the members regarding the accused's reference to dispositions in other cases.[148] On appeal, the AFCCA held that a judge does not err in instructing the members on how to consider matters raised by the accused in an unsworn statement.[149]

Therefore, while an accused has a right to make a virtually unrestricted unsworn statement upon which he may not be cross-examined by the trial counsel or questioned by the court,[150] a military judge does not err in providing the members with accurate and balanced instructions on how to consider the information in an unsworn statement in order to place it in proper context. Therefore, defense counsel should balance the arguable benefit gained by an accused introducing arguably

136. *Id.* at 499.

137. *Id.*

138. *Id.*

139. *Id.*

140. The trial was held in 1995, before enactment of Article 56a, UCMJ, which created the possibility of a sentence of confinement for life without eligibility for parole. *See* National Defense Authorization Act for Fiscal Year 1998, Pub. L. No. 105-85, § 581(a)(1), 111 Stat. 1759 (1997).

141. *Duncan*, 53 M.J. at 496.

142. *Id*. at 500.

143. *See, e.g*., United States v. Greaves, 46 M.J. 133 (1997) (stating that is an error not to instruct on effect of punitive discharge on retirement benefits for accused with nineteen years and ten months of service at time of trial).

144. Rules for Court-Martial 1005(a) provides that "the military judge shall give the members appropriate instructions on sentence," and RCM 801(a)(5) provides that it is the duty of the military judge to "instruct members on questions of law and procedure which may arise."

145. 53 M.J. 800 (A.F. Ct. Crim. App. 2000).

146. 52 M.J. 782 (A.F. Ct. Crim. App. 1999).

147. *Friedman*, 53 M.J. at 801. An accused's right to allocution is virtually unrestricted. *See, e.g*., United States v. Jeffrey, 48 M.J. 229 (1998) (stating that it is error to preclude accused from stating he would be discharged administratively if court-martial did not impose a punitive discharge); United States v. Grill, 48 M.J. 131 (1998) (stating that it is error to preclude accused from informing members how civilian co-conspirator cases were handled).

irrelevant information via an unsworn statement against the detrimental impact a military judge's instructions, such as those used in *Friedmann*, could have on the members' deliberations before advising an accused whether or not to disclose such information in the first place.

Airman First Class Raymond Satterley pled guilty to absence without leave, willful destruction of military property, and larceny of laptop computers, and he elected to be tried by members.[151] Before they retired to deliberate on an appropriate sentence, the members asked the military judge what happened to the four laptop computers not recovered by the government.[152] During a UCMJ, Article 39(a) session outside the presence of the members, the defense counsel requested permission to reopen its case and have the accused answer the question by making an additional unsworn statement.[153] The judge denied the request but did state he would allow the accused to take the witness stand and testify under oath, among other options.[154] The accused did not testify under oath and neither side presented any other evidence. The judge eventually instructed the

148. The military judge instructed as follows:

> Now, during his unsworn statement, the accused indicated that his commander would initiate an administrative discharge against him if the court did not impose a punitive discharge. In that regard, you should consider the following language in AFI 36-3208, "Administrative Separation of Airmen," dated 14 October 1994, paragraph 1.21, subparagraph 3, "Limitation on Service Characterization:" "Do not discharge an airman under other than honor[able] conditions if the sole basis for discharge is a serious offense that results in conviction by a court-martial that did not adjudge a punitive discharge unless such characterization is approved by the Secretary of the Air Force."
>
> In this case, if the court does not adjudge a punitive discharge, the accused might be subject to administrative discharge under other than honorable conditions only if a discharge authority found some other basis for the accused's discharge—in addition to the offense that resulted in his conviction at this court-martial. If such other basis were found by the discharge authority or if the accused's command obtained specific approval by the Secretary of the Air Force, the discharge authority could—but would not be required to—impose an under-other-than-honorable-conditions discharge. Otherwise, the accused could only be discharged under honorable conditions. You, of course, should not rely on any of this in determining an appropriate punishment for this accused for the offenses of which he stands convicted. The issue before you is not whether the accused should remain a member of the Air Force, but whether he should be punitively separated from the service. If you don't conclude the accused should be punitively separated from the service, than [sic] it is none of your business or concern as to whether anyone else might choose to initiate separation action, or how the accused's service might be characterized by an administrative discharge authority.
>
> Now, also during his unsworn statement the accused indicated what happened to others for commission of some similar offenses. There is, of course, no evidence on that point, but even if there were, the disposition in other cases is irrelevant for your consideration in adjudging an appropriate sentence for this accused. You do not know all the facts of those other cases, not anything about the [airmen] in those cases, and it is not your function to consider those matters in this trial. Likewise, it is not your position to second-guess the disposition of other cases, or even to try and place the accused's case in its proper place on the spectrum of some hypothetical scale of justice.
>
> Even if you knew all the facts about other offenses and offenders, that would not enable you to determine whether the accused should be punished more harshly or more leniently, because the facts are different, and because the disposition authority in those other cases cannot be presumed to have any greater skill than you in determining an appropriate punishment. If there is to be any meaningful comparison of the accused's case to those of others similarly situated, it would come by consideration of the convening authority at the time he acts on the adjudged sentence in this case. The convening authority can ameliorate a harsh sentence to bring it in line with appropriate sentences in other similar cases, but he cannot increase a light sentence to bring it in line with similar cases. In any event, such action is within the sole discretion of the convening authority.
>
> You, of course, should not rely on this in determining what is an appropriate punishment for this accused for the offenses of which he stands convicted. If the sentence you impose in this case is appropriate for the accused and his offenses, it is none of your concern as to whether any other accused was appropriately punished for his offenses.
>
> You have the independent responsibility to determine an appropriate sentence, and you may not adjudge an excessive sentence in reliance upon mitigating action by higher authority. You must consider all the evidence in this case, and determine its relative importance by the exercise of your good judgment and common sense. Remember, that the accused is to be punished only for the offenses of which he has been found guilty by this court.

Friedman, 53 M.J. at 801-02.

149. *Id*. at 804.

150. MCM, *supra* note 5, R.C.M. 1001(c)(2)(C).

151. *Satterley*, 52 M.J. at 783.

152. *Id*. The court-martial has equal opportunity to obtain witnesses and other evidence, subject to regulation or restriction by the President. MCM, *supra* note 5, MIL. R. EVID. 614.

153. *Id*. at 783.

154. *Id.* The other options could include stipulations of fact or expected testimony or other testimonial or documentary evidence.

members that there was no evidence before them on the disposition of the other computers, that they should not speculate what happened to them, and that no adverse inference should be drawn against the accused.[155]

The accused argued on appeal that the military judge abused his discretion by not allowing him to respond to the question by making an additional unsworn statement.[156] The AFCCA disagreed. The court acknowledged that, while an accused's allocution rights[157] are broad,[158] they are not unlimited and when the court members ask a relevant question on other than procedural matters, the only proper method for answering it is by the introduction of physical, documentary or testimonial evidence.[159] While an unsworn statement is an authorized means to bring information to the attention of the members, it is not evidence because, when presenting it, the accused is not under oath.[160]

What should counsel take from this case? While an accused has a right to explain evidence offered by the government in response to a question by the court by making an additional unsworn statement,[161] he cannot answer the court's question via an unsworn statement because the unsworn answers are not evidence.

Script This

Contrary to his pleas, Private Charles Rush was convicted by members at a special court-martial of breach of the peace, two specifications of aggravated assault with a dangerous weapon, and communicating a threat.[162] At sentencing, the military judge read the standard bad-conduct discharge instruction in the *Benchbook*.[163] However, he refused defense counsel's requested instruction describing the permanent stigma of a punitive discharge, also contained in the *Benchbook*.[164] The adjudged and approved sentence included a bad-conduct discharge and six months confinement.[165]

On appeal, the accused argued the military judge committed prejudicial error by refusing to give the requested defense instruction. In *United States v. Rush*,[166] the CAAF agreed with the lower court that the military judge has a duty to explain why he is refusing to give a standard instruction requested by the

155. *Id.*

156. *Id*.

157. Rule for Courts-Martial 1001(c)(2)(C) provides in part: "an accused may make an unsworn statement and may not be cross-examined by the trial counsel upon it or examined upon it by the court-martial." MCM, *supra* note 5, R.C.M. 1001(c)(2)(C).

158. *See, e.g.*, United States v. Britt, 48 M.J. 233 (1998) (stating that an accused can state he would be discharged administratively if court-martial did not impose a punitive discharge); United States v. Grill, 48 M.J. 131 (1998) (stating that an accused can relate what co-conspirators received).

159. *Satterly*, 52 M.J. at 785.

160. *See* United States v. Provost, 32 M.J. 98, 99 (C.M.A. 1991).

161. *Id*. (stating that an accused is entitled to make second unsworn statement to explain uttering of bad checks after government introduced the evidence to rebut his first unsworn statement).

162. United States v. Rush, 51 M.J. 605 (Army Ct. Crim. App. 1999).

163. The instruction, taken directly from the *Benchbook*, provided:

> You are advised that a bad conduct discharge deprives a soldier of virtually all benefits administered by the Veterans' Administration and the Army establishment. A bad conduct discharge is a severe punishment and may be adjudged for one who, in the discretion of the court, warrants more severe punishment for bad conduct, even thought the bad conduct may not constitute commission of serious offenses of a military or civil nature. In this case, if you determine to adjudge a punitive discharge, you may sentence Private Rush to a bad-conduct discharge; no other type of discharge may be ordered in this case.

Id. at 606 (citing BENCHBOOK, *supra* note 3, para. 2-6-10 (pattern instruction addressing the effect of a bad conduct discharge)).

164. This instruction provides:

> You are advised that the ineradicable stigma of a punitive discharge is commonly recognized by our society. A punitive discharge will place limitations on employment opportunities and will deny the accused other advantages which are enjoyed by one whose discharge characterization indicates that (he) (she) has served honorably. A punitive discharge will affect an accused's future with regard to (his) (her) legal rights, economic opportunities and social acceptability.

Id. at 607 (citing BENCHBOOK, *supra* note 3, para. 2-6-10 (addressing stigma of a punitive discharge)).

165. *Rush*, 51 M.J. at 606.

166. 54 M.J. 313 (2001).

defense and held that the military judge erred in refusing to give the requested instruction without explaining the basis for his decision on the record.[167] The court, however, found the error harmless and affirmed.[168]

It is important that practitioners not read too much into this case. While a military judge is required to give members appropriate sentencing instructions,[169] he has broad discretion in selecting which instructions to give.[170] In *Rush*, the court is not holding that standard *Benchbook* instructions are now required in all cases upon defense request.[171] The court did state, however, that the judge has a duty to explain why he is refusing to do so and the decision not to give a reason in this case was arbitrary and unreasonable.[172] However, in any given case, as instructions must be tailored to the facts, it is possible that a reason can be given[173] so trial counsel should request such an explanation if the judge is not forthcoming.

167. *Id*. at 315.

168. *Id*. at 316.

169. MCM, *supra* note 5, R.C.M. 1005(a).

170. United States v. Greaves, 46 M.J. 133, 139 (1997) (citing United States v. Wheeler, 38 C.M.R. 72, 75 (C.M.A. 1967)).

171. *Rush*, 54 M.J. at 317 (Crawford, C.J., concurring). The military judge is only required to advise the members of: (1) the maximum punishment; (2) the effect any sentence would have on the accused's entitlement to pay and allowances; (3) deliberation and voting procedures; (4) that they are solely responsible for selecting the sentence and must not rely on the possibility of mitigating action by higher authority; and (5) that they should consider all matters in extenuation, mitigation and aggravation, whether introduced before or after findings, and all other matters presented. *See* MCM, *supra* note 5, R.C.M. 1005(e).

172. *Rush*, 54 M.J. at 315.

173. For example, it may be the case that society no longer views a punitive discharge as a permanent stigma and the judge may conclude, under the circumstances of the case, that imposition of a punitive discharge might not actually affect this particular service member's economic rights, employment opportunities or social acceptability.

Appendix A

The Army Trial Judiciary recently replaced the current *Military Judges' Benchbook* Instruction 7-13-1, Uncharged Misconduct—Other Acts or Offenses, with the following:

7-13-1. OTHER CRIMES, WRONGS, OR ACTS EVIDENCE

NOTE 1: <u>The process of admitting other acts evidence</u>. Whether to admit evidence of other crimes, wrongs, or acts is a question of conditional relevance under MRE 104(b). In determining whether there is a sufficient factual predicate, the military judge determines admissibility based upon a three-pronged test: (1) Does the evidence reasonably support a finding by the court members that the accused committed the prior crimes, wrongs, or acts? (2) Does the evidence make a fact of consequence more or less probable? (3) Is the probative value of the evidence substantially outweighed by the danger of unfair prejudice, confusion of the issues or any other basis under MRE 403? If the evidence fails any of the three parts, it is inadmissible.

NOTE 2: <u>Using these instructions</u>. If the accused requests, trial counsel is required to provide reasonable notice, ordinarily in advance of trial, before offering evidence of other crimes, wrongs, or acts under MRE 404(b). When evidence of a person's commission of other crimes, wrongs, or acts is properly admitted prior to findings as an exception to the general rule excluding such evidence (See NOTE 1 on the process of admitting such evidence), the limiting instruction following this NOTE must be given upon request or when otherwise appropriate. When evidence of prior sexual offenses or child molestation has been admitted, the instructions following NOTES 3 and 4 may be appropriate in lieu of the below instruction.

You may consider evidence that the accused may have (<u>state the evidence introduced for a limited purpose</u>) for the limited purpose of its tendency, if any, to:

(identify the accused as the person who committed the offense(s) alleged in _____)

(prove a plan or design of the accused to_____)

(prove knowledge on the part of the accused that_____)

(prove that the accused intended to _____)

(show the accused's awareness of (his) (her) guilt of the offense(s) charged)

(determine whether the accused had a motive to commit the offense(s))

(show that the accused had the opportunity to commit the offense(s))

(rebut the contention of the accused that (his) (her) participation in the offense(s) charged was the result of (accident) (mistake) (entrapment))

(rebut the issue of _____ raised by the defense); (and)

(_____).

You may not consider this evidence for any other purpose, and you may not conclude from this evidence that the accused is a bad person or has general criminal tendencies and that (she) (he), therefore committed the offense(s) charged.

NOTE 3: <u>Sexual assault and child molestation offenses – MRE 413 or 414 evidence</u>. In cases in which the accused is charged with a sexual assault or child molestation offense, Military Rules of Evidence 413 and 414 permit the prosecution to offer, and the court to admit, evidence of the accused's commission of other sexual assault or child molestation offenses on any matter to which relevant. Unlike misconduct evidence that is not within the ambit of MRE 413 or 414, the members may consider this evidence on any matter to which it is relevant, to include the issue of the accused's propensity or predisposition to commit these types of crimes. The government is required to disclose to the accused the MRE 413 or 414 evidence that is expected to be offered under the rule at least 5 days before trial. When evidence of the accused's commission of other offenses of sexual assault under MRE 413, or of child molestation under MRE 414, is properly admitted prior to findings as an exception to the general rule excluding such evidence, the MILITARY JUDGE should give the following appropriately tailored instruction upon request or when otherwise appropriate.

You have heard evidence that the accused may have previously committed (another) (other) offense(s) of (sexual assault) (child molestation). You may consider the evidence of such other act(s) of (sexual assault) (child molestation) for (its) (their) tendency, if any, to show the accused's propensity to engage in (sexual assault) (child molestation), as well as (its) (their) tendency, if any, to:

(identify the accused as the person who committed the offense(s) alleged in _____)

(prove a plan or design of the accused to_____)

(prove knowledge on the part of the accused that_____)

(prove that the accused intended to _____)

(show the accused's awareness of (his) (her) guilt of the offense(s) charged)

(determine whether the accused had a motive to commit the offense(s))

(show that the accused had the opportunity to commit the offense(s))

(rebut the contention of the accused that (his) (her) participation in the offense(s) charged was the result of (accident) (mistake) (entrapment))

(rebut the issue of _____ raised by the defense); (and)

(_____).

You may not, however, convict the accused merely because you believe (she) (he) committed (this) (these) other offense(s) or merely because you believe he has a propensity to engage in (sexual assault) (child molestation). The prosecution's burden of proof to establish the accused's guilt beyond a reasonable doubt remains as to each and every element of (each) (the) (offense(s) charged.

NOTE 4: Use of Charged MRE 413/414 Evidence. There will be circumstances where evidence relating to one charged sexual assault or child molestation offense is relevant to another charged sexual assault or child molestation offense. If so, the following instruction may be used, in conjunction with NOTE 3, as applicable.

(Further), evidence that the accused committed the (sexual assault) (act of child molestation) alleged in [state the appropriate specification(s) and Charge(s)] may be considered by you as evidence of the accused's propensity, if any, to commit the (sexual assault) (act of child molestation) alleged in [state the appropriate specification(s) and Charge(s)]. You may not, however, convict the accused of one offense merely because you believe (he) (she) committed (this) (these) other offense(s) or merely because you believe (he) (she) has a propensity to commit (sexual assault) (child molestation). Each offense must stand on its own and proof of one offense carries no inference that the accused is guilty of any other offense. In other words, proof of one (sexual assault) (act of child molestation) creates no inference that the accused is guilty of any other (sexual assault) (act of child molestation). However, it may demonstrate that the accused has a propensity to commit that type of offense. The prosecution's burden of proof to establish the accused's guilt beyond a reasonable doubt remains as to each and every element of each offense charged.

NOTE 5: Use of other acts evidence in sentencing proceedings. When evidence has been admitted on the merits for a limited purpose raising an inference of uncharged misconduct by the accused, there is normally no sua sponte duty to instruct the court members to disregard such evidence in sentencing, or to consider it for a limited purpose. Although the court in sentencing is ordinarily permitted to give general consideration to such evidence, it should not be unnecessarily highlighted. Evidence in aggravation, however, must be within the scope of RCM 1101(b). A limiting instruction on sentencing may be appropriate sometimes, for example, when evidence of possible uncharged misconduct has been properly introduced but subsequently completely rebutted, or when the inference of possible misconduct has been completely negated. For example, if there were inquiry of a merits character witness whether that witness knew the accused had been arrested for an uncharged offense, to impeach that witness' opinion, and it was then shown that the charges underlying the arrest were dismissed or that the accused was acquitted, it may be appropriate on sentencing to instruct that the arrest be completely disregarded in determination of an appropriate sentence. In such case, there is actually no proper evidence of uncharged misconduct remaining at all, and the court members might improperly consider the inquiry regarding the arrest alone as being adverse to the accused. Instruction 7-18, "Have You Heard" Questions to Impeach is appropriate when "have you heard/do you know" questions regarding uncharged misconduct have been asked.

REFERENCES

a. MRE 105, 403, 404(b), 413, and 414.

b. Application of Federal Rules of Evidence and Military Rules of Evidence 413 and 414: *United States v. Wright*, 53 M.J. 476 (2000); *United States v. Henley*, 53 M.J. 488 (2000); *United States v. Parker*, 54 M.J. 700 (Army Ct. Crim. App. 2001) (disclosure requirements); and *United States v. Myers*, 51 M.J. 570 (N-M. Ct. Crim App. 1999).

c. Test for admissibility under MRE 404(b): *United States v. Mirandez-Gonzalez*, 26 M.J. 411 (C.M.A. 1988); *United States v. Reynolds*, 29 M.J. 105 (C.M.A. 1989), and *Huddleston v. United States*, 485, U.S. 681 (1988).